

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

TELEPHONE (605) 224-0560
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August 16, 2004

Bruce J. Gering
Assistant United States Trustee
230 South Phillips Avenue, Suite 502
Sioux Falls, South Dakota 57102

Patrick W. Kiner, Esq.
P.O. Box 434
Mitchell, South Dakota 57301

Subject: ***In re Claire S. Ruff***
Chapter 7; Bankr. No. 04-40353

Dear Mr. Gering and Mr. Kiner:

The matter before the Court is the United States Trustee's Motion for Summary Judgment with respect to his Motion to Dismiss for Substantial Abuse. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's findings and conclusions under Fed.Rs.Bankr.P. 7052 and 9014. As set forth below, the Court will grant the United States Trustee's motion.

Summary. On March 16, 2004, Claire S. Ruff ("Debtor") filed for relief under chapter 7 of the bankruptcy code. Debtor is single and has no dependents. According to his schedules, Debtor has unsecured debts totaling \$34,790.03, monthly net income of \$2,442.30,¹ and monthly expenses totaling \$2,363.37.

On June 4, 2004, the United States Trustee filed a Motion to Dismiss for Substantial Abuse. In his motion, the United States Trustee alleged that based upon pay vouchers Debtor had provided to the United States Trustee, it appeared Debtor had understated his monthly net income, in part because Debtor had included deductions for his 401K contributions and a 401K loan repayment on his Schedule I. The United States Trustee also alleged that based upon Debtor's testimony at his § 341 meeting

¹ Debtor's income is derived from full-time employment at Graphic Packaging, Inc. ("Graphic Packaging") and, although it is not readily apparent from Debtor's Schedule I or his Statement of Financial Affairs, part-time employment at Davison County Public Safety.

of creditors, Debtor's monthly expenses needed to be adjusted to reduce Debtor's water and sewer expense from \$335.00 to \$35.00 and to include \$350.00 Debtor would incur for health insurance for his ex-wife as a condition of their divorce.² According to the United States Trustee, Debtor has monthly disposable income of \$624.50. This sum, the United States Trustee argued, would permit Debtor to pay his unsecured creditors \$22,482.00 over a three-year period. Alternatively, the United States Trustee argued, Debtor could repay 100% of his unsecured debt by committing \$579.83 of his monthly disposable income to that purpose.

On June 22, 2004, Debtor filed a response to the United States Trustee's motion to dismiss. In his response, Debtor first denied understating his income. Debtor then stated that his monthly expenses would increase by \$350.00 in January 2005 when he begins making alimony payments to his ex-wife.³ Debtor also stated that he had recently been hospitalized and was still recovering from an unspecified illness. Finally, Debtor stated that he did not have the ability to repay his unsecured creditors.

On June 29, 2004, the United States Trustee filed a Motion for Summary Judgment. In his motion, the United States Trustee alleged that based upon the pay vouchers attached to Debtor's response to the United States Trustee's motion to dismiss, Debtor has monthly net income of \$3,071.50. The United States Trustee also alleged that based upon Debtor's Schedule J, which already included a \$350.00 alimony payment, and Debtor's testimony at his § 341 meeting of creditors, Debtor has monthly expenses totaling \$2,413.37. According to the United States Trustee, Debtor thus has monthly disposable income of \$658.13, which would permit him to pay his unsecured creditors \$20,323.40 over three years or \$34,539.02 over five years, after allowance is made for estimated attorney fees and the chapter 13 trustee's fee.

² It is not clear from the record whether this is in addition to, or duplicative of, the \$350.00 for "[a]limony, maintenance or support paid to others" Debtor listed on his Schedule J.

³ It is likewise not clear from the record whether this is in addition to, or duplicative of, either the \$350.00 for "[a]limony, maintenance or support paid to others" Debtor listed on his Schedule J or the \$350.00 adjustment referred to in the United States Trustee's motion to dismiss.

Re: *Ruff*
August 16, 2004
Page 3

On July 15, 2004, Debtor filed a resistance to the United States Trustee's motion for summary judgment. In his resistance, Debtor stated that because of a change in his work schedule at Graphic Packaging, he would no longer be able to work part-time for Davison County Public Safety and that, as far as he knew, his 401K loan repayment was not voluntary. Debtor also questioned whether a \$339.34 "PIP" bonus he received earlier this year is guaranteed or will be available in the future. Finally, Debtor admitted he had monthly disposable income of \$189.48.

On July 29, 2004, the Court asked Debtor's attorney to confirm the amount of Debtor's 401K loan. On August 4, 2004, Debtor's attorney provided documentation showing that as of July 31, 2004, Debtor owed \$5,573.07 on that loan. The matter was taken under advisement.

Summary Judgment. Summary judgment is appropriate when "there is no genuine issue [of] material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Bankr.P. 7056 and Fed.R.Civ.P. 56(c). An issue of material fact is *genuine* if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (quotes therein). A genuine issue of fact is *material* if it might affect the outcome of the case. *Id.* (quotes therein).

The matter must be viewed in the light most favorable to the party opposing the motion. *F.D.I.C. v. Bell*, 106 F.3d 258, 263 (8th Cir. 1997); *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1490 (8th Cir. 1992) (quoting therein *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587-88 (1986), and citations therein). Where motive and intent are at issue, disposition of the matter by summary judgment may be more difficult. *Cf. Amerinet*, 972 F.2d at 1490 (citation omitted).

The movant meets his burden if he shows the record does not contain a genuine issue of material fact and he points out that part of the record that bears out his assertion. *Handeen v. LeMaire*, 112 F.3d 1339, 1346 (8th Cir. 1997) (quoting therein *City of Mt. Pleasant v. Associated Electric Coop*, 838 F.2d 268, 273, (8th Cir. 1988)). No defense to an insufficient showing is required. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 156 (1970) (citation therein); *Handeen*, 112 F.3d at 1346.

If the movant meets his burden, however, the non movant, to defeat the motion, "must advance specific facts to create a genuine issue of material fact for trial." *Bell*, 106 F.3d at 263 (quoting *Rolscreen Co. v. Pella Products of St. Louis, Inc.*, 64 F.3d 1202, 1211 (8th Cir. 1995)). The non movant must do more

than show there is some metaphysical doubt; he must show he will be able to put on admissible evidence at trial proving his allegations. *Bell*, 106 F.3d 263 (citing *Kiemele v. Soo Line R.R. Co.*, 93 F.3d 472, 474 (8th Cir. 1996), and *JRT, Inc. v. TCBY System, Inc.*, 52 F.3d 734, 737 (8th Cir. 1995)).

Substantial Abuse. Pursuant to 11 U.S.C. § 707(b), the Court may dismiss a chapter 7 case "if it finds that the granting of relief would be a substantial abuse" of chapter 7. Section 707(b) is intended to promote fairness to creditors and prevent the use of chapter 7 by unneedy debtors. *Stuart v. Koch (In re Koch)*, 109 F.3d 1285, 1288 (8th Cir. 1997).

The bankruptcy code does not define "substantial abuse." However, in interpreting § 707(b), the Eighth Circuit Court of Appeals has held that the primary inquiry is whether the debtor has the ability to pay her creditors. *Id.* (citing *In re Walton*, 866 F.2d 981, 983 (8th Cir. 1989)); *Nelson v. Siouxland Federal Credit Union (In re Nelson)*, 223 B.R. 349, 353 (B.A.P. 8th Cir. 1998). A debtor's ability to pay her creditors is measured by evaluating the debtor's financial condition in a hypothetical chapter 13 case. *Id.* The analysis includes the expectation that the debtor would put forth her best efforts in a chapter 13 plan. *In re Shelley*, 231 B.R. 317, 319 (Bankr. D. Neb. 1999); *In re Pamela E. Beauchamp*, Bankr. No. 97-50487, slip op. at 6 (Bankr. D.S.D. May 28, 1998) (citing *Hagel v. Drummond (In re Hagel)*, 184 B.R. 793, 798 (B.A.P. 9th Cir. 1995)). If the debtor has the substantial ability to pay her creditors, her chapter 7 case should be dismissed. *Koch*, 109 F.3d at 1288.

Discussion. In his resistance to the United States Trustee's motion for summary judgment, Debtor calculated his monthly disposable income as follows:

income (Graphic Packaging)	\$ 2,787.85
less monthly expenses (UST Exhibit 2)	\$ 2,413.37
less 401K loan repayment	<u>\$ 185.00</u>
monthly disposable income	<u><u>\$ 189.48</u></u>

Debtor's calculations, however, fail to take into account the Court's previous rulings that a debtor may not divert funds into a 401K account that would otherwise be available to pay creditors. *In re Haar*, Bankr. No. 00-10183, slip op. at 7 (Bankr. D.S.D. May 7, 2001). See also *In re Simmons*, Bankr. No. 02-40805, slip op. at 3 (Bankr. D.S.D. November 21, 2002); *In re Goergen*, Bankr. No. 99-50511, slip op. at 3 (Bankr. D.S.D. March 17, 2000); *In re Mendelsohn*, Bankr. No. 98-40099, slip op. at 10 (Bankr. D.S.D. November 10, 1998). Debtor has given the Court no reason to reach a different conclusion in this case.

Adding the \$185.00 401K loan repayment to Debtor's admitted disposable income gives Debtor monthly disposable income of \$374.48. This would permit Debtor to pay his unsecured creditors \$11,383.15 over a three-year period⁴ or \$19,471.92 over a five-year period.⁵ Either figure represents a significant portion of Debtor's unsecured debt of \$40,363.10.⁶ Thus, the Court concludes Debtor has the substantial ability to pay his creditors.⁷

⁴	monthly disposable income	374.48
	times 36 months	<u>13,481.28</u>
	less chapter 13 trustee's fee	1,348.13
	less estimated attorney's fees	<u>750.00</u>
	available for unsec'd creditors	<u>11,383.15</u>

⁵	monthly disposable income	374.48
	times 60 months	<u>22,468.80</u>
	less chapter 13 trustee's fee	2,246.88
	less estimated attorney's fees	<u>750.00</u>
	available for unsec'd creditors	<u>19,471.92</u>

⁶ This figure includes the \$5,573.07 balance remaining on Debtor's 401K loan.

⁷ The Court's calculation of Debtor's ability to pay differs slightly from the United States Trustee's and Debtor's. According to the pay voucher from Graphic Packaging Debtor offered in support of his response to the United States Trustee's motion to dismiss, Debtor "took home" \$12,515.77 during the first 12 bi-weekly pay periods in 2004. On average, Debtor thus takes home \$2,259.79 per month (\$12,515.77 divided by 12 pay periods year to date in 2004 times 26 pay periods in a year divided by 12 months in a year). However, included among the deductions from Debtor's gross pay were \$1,163.05 for his 401K contributions and \$1,168.80 for his 401K loan payments. Debtor's monthly take-home pay must therefore be increased by \$421.03 (\$1,163.05 plus \$1,168.80 divided by 12 pay periods year to date in 2004 times 26 pay periods in a year divided by 12 months in a year). Using these figures, the Court calculates Debtor's ability to pay as follows:

average monthly take-home pay	2,259.79
plus average 401K deductions	<u>421.03</u>
adjusted monthly take-home pay	2,680.82

The Court will enter an order granting the United States Trustee's motion for summary judgment. The order will provide that if Debtor does not voluntarily convert this case to chapter 13 on or before August 26, 2004, this case will be dismissed on August 27, 2004.

Sincerely,

/s/ Irvin N. Hoyt

Irvin N. Hoyt
Bankruptcy Judge

INH:sh

cc: case file (docket original; copies to parties in interest)

less monthly expenses	<u>2,413.37</u>
monthly disposable income	<u>267.45</u>

This would still permit Debtor to pay his unsecured creditors \$5,389.15 over a three-year period or \$9,481.92 over a five-year period.

monthly disposable income	267.45
times 36 months	<u>9,628.20</u>
less chapter 13 trustee's fee	962.82
less estimated attorney's fees	<u>750.00</u>
available for unsec'd creditors	<u>7,915.38</u>

monthly disposable income	267.45
times 60 months	<u>16,047.00</u>
less chapter 13 trustee's fee	1,604.70
less estimated attorney's fees	<u>750.00</u>
available for unsec'd creditors	<u>13,692.30</u>

Either figure still represents a substantial portion of Debtor's unsecured debt. The Court would therefore reach the same conclusion it reached using the United States Trustee's and Debtor's figures.